IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 491 of 1992

with

CRIMINAL MISC.APPLICATION No 5236 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KAUSHIKBHAI FULABHAI PANCHAL

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 491 of 1992
   MR KJ SHETHNA for Petitioners
   MR KG SHETH, APP for Respondent No. 1
   ..... for Respondents No. 2-3
3. Criminal Misc.Application No. 5236 of 1993
   MR KJ SHETHNA for Petitioner No. 1
   MR KG SHETH, APP for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 29/10/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE AKSHAY H.MEHTA)

1. The appellants have filed this appeal under Section 374 of the Code of Criminal Procedure challenging the judgment and order of conviction and sentence passed by the Ld. Addl. Sessions Judge, Nadiad dated 16/4/1992. Vide said judgment the appellants have been convicted for offence punishable u/S. 302 read with section 34 of the Indian Penal Code and they have been sentenced to suffer RI for life and to pay fine of Rs.5,000/-, in default RI for 15 days. They have also been convicted for offence punishable u/S. 324 read with section 114 of the Indian Penal Code and sentenced to suffer RI for 3 years and pay fine of Rs.500/-, in default RI for one week. The Ld. Judge has given direction that upon recovery of fine of Rs.5,000/-, amount to be given to Vinaben, widow of deceased Ashokbhai Chunilal Panchal by way of compensation. Further direction has been given by the Ld. Judge that if fine of Rs.500/- is recovered, the amount to be given to injured Bharatbhai Chunilal Panchal as compensation.

2. The case of the prosecution is that on 11th September, 1990 wife of Ashokbhai Panchal had come to the place of appellant no. 1 to invite them to a dinner arranged as a part of obsequial ceremonies on the 12th day of the demise of mother of one Kanubhai, namely Mahalaxmiben. At that time the wives of appellants nos. 1 and 2 had talked to Vinaben very rudely and they had insulted her. After returning home Vinaben informed her husband and other members of the family about the rude behaviour of the ladies. On the very night at about 9.45 p.m. deceased Ashokbhai alongwith prosecution witness Bharatbhai Panchal and Kanubhai was sitting outside the house of Kanubhai and all the three were talking about the obsequial ceremonies of Mahalaxmiben. During the course of the talks, they also discussed the incident wherein Vinaben came to be insulted by the wives of appellant nos. 1 and 2. At that very time nephew of appellant no. 1 Alkeshbhai was sitting near these people and he overheard the talks which were going on between Ashokbhai and Kanubhai. He, therefore, went home and informed the appellants that Ashokbhai and Bharatbhai

were instigating Kanubhai against the appellants. As a result of this, the present appellants came at the place where Ashokbhai and others were sitting. Kaushikbhai i.e. appellant no. 1 asked Ashokbhai that why he was instigating Kanubhai against them. Ashokbhai therefore, replied that they were talking inter-se and they were not talking anything about the appellants. On hearing this reply, appellant got enraged and he immediately went to the shop of one Bhikhabhai, who is a cobbler and brought implement for cutting leather known as Rapi and with said Rapi he caused one injury to Ashokbhai on the left side of his abdomen. Bharatbhai tried to intervene, but he was caught hold of by appellant nos. 2 and 3 and appellant no. 1 caused two injuries with Rapi on the right hand shoulder and one injury on left thigh. At that time the paternal aunts of Ashokbhai and Bharatbhai, namely Shantaben and Kantaben came there and on seeing them the appellants went away.

According to the prosecution, Bharatbhai and Kanubhai thereafter took Ashokbhai on a scooter to Haridas Municipal hospital. After taking initial treatment Ashokbhai was thereafter removed to the Civil Hospital at Nadiad. At the Civil Hospital one Mariyamben, an employee of the Civil Hospital, telephoned the police station and summoned the police at the hospital. When the police visited the hospital, Bharatbhai gave the complaint which was duly recorded by the police. This complaint is at Exh. 25 on record. Bharatbhai was also admitted in the hospital as an indoor patient and since condition of Ashokbhai was precarious, he was advised to be taken to Ahmedabad. Accordingly Ashokbhai was brought to Ahmedabad in the Civil Hospital where during treatment he expired.

The police on receipt of the complaint commenced usual investigation and in the course of the same they arrested the appellants, recorded statements of various persons conversant with the facts of the case, drew panchnamas, got the post mortem of the dead body of Ashokbhai done, obtained the necessary medical certificates with regard to injuries to Bharatbhai and seized the blood stained clothes of the deceased as well as Bharatbhai and sent them for chemical analysis to the Forensic Science Laboratory and obtained its report. Upon completion of the investigation, a charge-sheet against the appellants was submitted in the Court of the Ld. Judicial Magistrate First Class at Nadiad and the Ld. magistrate committed the case to the Court of Sessions, as the offence punishable u/S. 302 was exclusively triable by the Court of Sessions.

3. At the trial the Ld. Judge framed charge against the appellants for offences u/S. 302 read with section 34 of the Indian Penal Code, for offence u/S. 324 read with section 114 of the Indian Penal Code and also for offence u/S. 135 of the Bombay Police Act. The charge is at Exh. 2 on record of the case. The appellants denied the charge and claimed to be tried.

4. At the trial the prosecution examined (1) Dr. K.I. Methews P.W. 1 Exh.13, (2) Bharatbhai Chunilal Panchal P.W. 2 Exh. 24, (3) Bhikhabhai Vitthaldas Chauhan P.W. 3 Exh. 26, (4) Hasmukhlal Hiralal P.W.4 Exh. 40, (5) Kanubhai Manilal Panchal P.W.5 Exh. 42, (6) Dineshbhai Haribhai P.W. 6 Exh. 43, (7) Mohanbhai Mathurbhai P.W.7 Exh. 45, (8) Vijeshkumar Satishchandra Rao P.W.8 Exh. 47, (9) Vajesinh Vakhatsinh Rathod P.W.9 Exh. 48 and Bharatsinh Pratapsinh Sarvaiya P.W.10 Exh. 49. In support of its case the prosecution also relied on certain documentary evidence, namely complaint at Exh.25, the panchnama of inquest at Exh.28, panchnama of the weapon used in commission of the offence Exh.29, post mortem notes of deceased Ashokbhai Exh.34, panchnama of scene of offence at Exh. 44 and also the injury certificate of Bharatbhai at Exh.17, etc.

After the evidence of prosecution was recorded the appellants in their further statements u/S. 313 of the Code of Criminal Procedure were put the circumstances appearing against them in evidence to enable them to render any explanation, if they so desire. However, no specific case was pleaded by them except that a false case had been filed against them.

5. At the end of the trial the Ld. Addl. Sessions Judge came to the conclusion that the prosecution had been able to prove that Ashokbhai Chunilal Panchal had died homicidal death and the death was caused by appellant no.1. The Ld. Judge also came to the conclusion that the prosecution had been able to prove that on 11th September, 1990 at about 9.45 p.m. the appellants in furtherance of their common intention to commit murder had picked up quarrel with deceased Ashokbhai and Bharatbhai and appellant no. 1 had brought Rapi from the shop of Bhikhabhai and caused a fatal injury to Ashokbhai on the left side of his abdomen by said Rapi and thereby all the three appellants committed offence punishable u/S. 302 read with section 34 of the Indian Penal Code. The Ld. Judge also came to the conclusion that at the same time the other appellant nos. 2 and 3 had caught hold of Bharatbhai while appellant no.

1 caused him injuries on the right hand shoulder and also on the left thigh by means of the Rapi and thereby all three appellants had committed offence punishable u/S. 324 read with section 114 of the Indian Penal Code. The Ld. Judge held that the prosecution had not been able to prove offence against the appellants u/S. 135 of the Bombay Police Act. In short, according to the Ld. Addl. Sessions Judge, the prosecution had been able to establish beyond any reasonable doubt that the appellants had committed offences u/Ss. 302 read with section 34 of the Indian Penal Code and u/S. 324 read with section 114 of the Indian Penal Code and for that he awarded them the sentences which have been already described above.

6. The appellants on being aggrieved by the said judgment and order of conviction and sentence, have approached this Court by way of this appeal u/S. 374(2) of the Code of Criminal Procedure. The appeal came to be admitted by this Court [Coram : K.J. Vaidya and J.M. Panchal, JJ.] vide order dated 24th June, 1992. The same reads as under :-

> "Appeal admitted. Bail for appellant no. 1 is refused. So far as appellants nos. 2 and 3 are concerned, they are ordered to be released on same bail fresh bonds."

7. Subsequently another application came to be filed by appellant no. 1 being Misc. Criminal Application No. 4839 of 1992 praying that during pendency of the appeal his sentence of imprisonment for life be suspended and he be released on bail. The said application came to be granted by the Division Bench of this Court comprising the Hon'ble Mr. Justice N.J. Pandya and Hon'ble Mr. Justice D.G. Karia vide order dated September 17, 1993.

On his release from the prison, appellant no.1 was murdered on 25th September, 1993. As a result thereof the widow of appellant no. 1 has filed aforesaid Criminal Misc. Application u/S. 394 of the Code of Criminal Procedure requesting that she be allowed to continue the present appeal in place of appellant no.1. This application was filed on 12th October, 1993 and it was placed before the Division bench of this Court comprising Hon'ble Mr. Justice B.C. Patel and Hon'ble Mr. Justice K.R. Vyas and on July 5, 1995 the following order was passed :-

> "At the request of the learned advocate Misc. Criminal Application No. 5236 of 1993 is ordered to be heard with the main appeal."

In light of this order, we now take up this Misc. Criminal Application for our consideration. We, therefore, issue Rule and direct Mr. K.G. Sheth, Ld. APP to waive service of rule on behalf of respondent. Accordingly Mr. Sheth has waived the service and has addressed us on the merits of the application. Having heard both the sides on this application, we therefore finally disposed of this Misc. Criminal Application.

Provisions of section 394 of the Code of Criminal Procedure deal with abatement of appeals. The section inter-alia provides that every appeal u/S. 377 or section 378 shall finally abate on the death of the accused and every other appeal under this chapter (except an appeal from sentence of fine) shall finally abate on the death of the appellant. It is, therefore, clear that if a sentence of fine is involved, a question of conviction and sentence will have to be gone into even on the death of appellant, as the fine is recoverable from the assets of the deceased appellant in the hands of legal representatives. Even assuming that the appeal abates on the death of the appellant, the proviso of section 394 read with sub-section (2) of section 394 enables any near relative to prosecute the appeal by filing necessary application within the period of limitation prescribed therein as by virtue of sentence of fine, the proprietory interest of deceased's relatives is involved. In view of the averments made in the application as well as in the light of the submissions made by the counsels of both the parties, we are of the opinion that this is a fit case where the application of the widow of appellant no. 1 be granted and she may be permitted to prosecute the appeal. The rule is, therefore, made absolute in aforesaid Criminal Misc. Application.

8. Now reverting backl to the appeal, Mr. K.J. Shethna, learned counsel for the appellants has submitted that the prosecution has not been able to prove its case beyond any reasonable doubt and, therefore, his case should fail. According to him, the Ld. trial Judge has committed an error in holding the appellants guilty of the offences with which they were charged. He has further submitted that in the alternative considering the facts of the case, appellant no. 1 can at the most be held guilty of committing an offence punishable u/S. 304 Part-II of the Indian Penal Code for causing injuries to deceased Ashokbhai. He has further submitted that so far injuries caused to Bharatbhai are concerned, there is no reliable evidence and appellant no. 1 should be

acquitted of the said offence. He has further submitted that looking to the fact that the appellants came to the scene of offence unarmed and after initial heated altercation which lasted for about 10 minutes, appellant no. 1 went to the shop of Bhikhabhai and brought Rapi and caused injuries to Ashokbhai and Bharatbhai, appellant nos. 2 and 3 cannot be saddled with any criminal liability by virtue of sections 34 and 114 of the Indian Penal Code. In other words, according to him, the prosecution had failed to prove that there was any common intention shared by all the appellants to commit an offence u/S. 302 of the Indian Penal Code and appellants nos. 2 and 3 cannot be convicted for offence u/S. 302 r/w. section 34 of the Indian Penal Code. He has further submitted that so far injuries caused to prosecution witness Bharatbhai are concerned, there are two sets of evidence on record, one attributing overt act to appellant nos. 2 and 3 to the effect that when Bharatbhai tried to prevent assault on Ashokbhai, appellant nos. 2 and 3 caught hold of him and appellant no. 1 caused him injuries on shoulder as well as left thigh. As against that, the other set of witnesses does not attribute any overt act having been committed by appellant nos. 2 and 3. He, therefore, submitted that the evidence which favours appellant nos. 2 and 3 be accepted and their conviction for offence punishable u/S. 324 read with section 114 of the Indian Penal Code be set aside. He has further submitted that appellant nos. 1 and 2 have also suffered injuries and the prosecution has not been able to explain those injuries and, therefore, that benefit should be given to the appellants. He has also submitted that the assault on Ashokbhai and Bharatbhai by appellant no. 1 could also be possible for exercising right of private defence.

As against that, Mr. K.G. Sheth, Ld. APP appearing for the State, has submitted that looking to the weapon and the nature of injury and the place at which it has been caused on the body of deceased Ashokbhai, it can well be inferred that the appellant no. 1 had the intention of causing death of Ashokbhai. He has further submitted that the other appellants, namely appellant nos. 2 and 3 have also participated in the incident and their participation shows that there was a common intention shared by all the appellants to commit offences of murder and assault. His submission is that catching hold of Bharatbhai by appellant nos. 2 and 3 would show that they had facilitated assault on Bharatbhai by appellant no. 1 and thereby all the three had acted in furtherance of their aforesaid common intention. According to Mr. Sheth, the conviction

recorded by the Ld. Judge of the appellants was proper and the sentence imposed upon them was completely legal and, therefore, this appeal is required to be dismissed.

9. To appreciate the rival contentions, we may now refer to the relevant evidence oral as well as documentary on the record of this case.

9.1. The prosecution has examined Dr. K.I. Methews P.W.1 Exh.13, who at the relevant time was attached to the Civil Hospital at Nadiad as Medical Officer. According to the evidence of this witness, at about 10.00 p.m. on 11th September, 1990 injured Ashokbhai Chunilal was brought to the Civil Hospital with Yadi issued by police of Nadiad Town Police Station. On examination, he found one stab wound of 6 cm x 3 cm bleeding on the left hand side of the abdomen and the Intestine had come out from the said wound. The injury was panitoriam cavity deep. He, therefore, called the full time Surgeon attached to the said hospital. On examination of the injured, the full time Surgeon advised him to be taken to the Civil Hospital at Ahmedabad as his condition was very serious. Acting on the advice of the Surgeon attached to the Civil Hospital, Nadiad, injured Ashokbhai was removed to the Civil Hospital at Ahmedabad. During the course of treatment at Ahmedabad Ashokbhai expired.

9.2. Vijeshkumar Satishchandra Rao has been examined by the prosecution as P.W.8 at Exh.47. Mr. Rao at the relevant time was serving as Tutor in Forensic Medicine Department at B.J. Medical College at Ahmedabad on 12th September, 1990. On 13th September, 1990 a dead body was brought from Civil Hospital Ahmedabad by Police Head Constable of Shahibaug Police Station alongwith police Yadi for carrying out the autopsy thereof. The dead body was that of Ashokbhai Chunilal. This witness commenced the autopsy at about 10.30 a.m. and completed the same at 12.15 p.m. Before the trial Court this witness has produced the result of autopsy in the form of post mortem notes at Exh.34. The post mortem notes show following injuries on the dead body of Ashokbhai, namely (1) Stab wound found over abdomen left upper quadrant about 22.0 cms. below and 3.5 Cms. lateral to left nipple. Its size is about 4.5 Cms. x 1.5 Cms. x going deep in the abdominal cavity. It is obliquely vertical having upper end lateral and outer and lower end medially upper angle is acute of the margins are clean cut regular and red and show clotted blood. The wound is directed inwards, medially downwards and posteriority. Blood is found in the wound. (2) A small abrasion found over right wrist joint anterolateral aspect, size about 0.5 cm. diameter.

Red in colour. (3) Abrasion over left left great toe medial part, size about 1.2 cm. x 0.8 cm. Red in colour. (4) Abrasion over left arm posterior aspect about 7.0 Cm. proximal to olceranon process. It is oblique semilunar in shape, size about 0.6 cm. x 0.2 cm. Red in colour. This witness found the internal injury corresponding to external injury no.1. A stab wound directed inwards medially, downwards & posteriorly. Along its course it cuts skin, sub-cutaneous tissue, abdominal muscles about lower 0.5 cm. of costal cartilage of 10th left rib, peritoneum, mesentery and penetrates into left kidney anterolateral aspect middle part. In the opinion of this witness, the cause of death was haemorrhage and shock as a result of stab injury sustained to left kidney. Injury caused by sharp edged penetrating object.

9.3. The defence has not been able to bring out any material of significance rendering the evidence of these two witnesses doubtful. In our opinion, therefore, the prosecution has been successful enough to establish that deceased Ashokbhai died a homicidal death.

9.4. The prosecution has examined Bharatbhai Chunilal Panchal, P.W. 2 Exh. 24 to establish that the appellants were the authors of this crime. According to this witness, deceased Ashokbhai was his real brother. He had a cousin Kanubhai Manubhai Panchal. Kanubhai's mother Mahalaxmiben had expired and, therefore, on 11th September, 1990 at about 9.45 p.m. he, Ashokbhai and Kanubhai were sitting outside the house of Kanubhai and they were talking about the obsequial ceremonies of Mahalaxmiben. He has further stated that on that day Vinaben, his sister-in-law had been to different relatives for inviting them to a dinner arranged as a part of obsequial ceremonies on the 12th day of Mahalaxmiben's demise. Vinaben had also gone to the house of appellant no. 1 for inviting them for dinner. At that time Shobhnaben, wife of appellant no. 1 and her sister-in-law Kailasben talked to Vinaben in a very rude manner and insulted her. This was informed by Vinaben when she returned home to the family members. During their talks this topic was also touched and at that time Kanubhai told Ashokbhai and Bharatbhai as to why Vinaben was sent to the house of Kaushikbhai as the relations between the two families were not cordial. This was over heard by one Alkeshbhai, who happened to be the nephew of appellant no.1. Alkeshbhai went home and informed appellant no. 1 about the talks going on between Kanubhai and deceased Ashokbhai and Bharatbhai. The witness has further stated that appellant no. 1

alongwith appellant nos. 2 and 3 came there and he asked deceased Ashokbhai why he was instigating Kanubhai against them. In reply Ashokbhai told him that they were not talking about him i.e. appellant no.1. However, on receiving this reply, appellant no. 1 got enraged and he went to the shop of cobbler Bhikhabhai and brought Rapi and he caused injury on Ashokbhai on the left abdomen. As a result of this injury Ashokbhai started bleeding profusely. At this juncture the witness tried to intervene, but he was caught hold of by appellant nos. 2 and 3 and appellant no. 1 caused injuries with Rapi to the witness on his right hand shoulder and also on the left thigh. He also started bleeding. He has further stated that when the assault was going on, his paternal aunts, namely Shantaben and Kantaben came there and on seeing them the appellants went away. The witness and Kanubhai thereafter took Ashokbhai to Municipal Haridas Hospital on a scooter for treatment. After taking primary treatment Ashokbhai was taken to Civil Hospital at Nadiad in a rickshaw. In Civil Hospital one Mariyamben, an employee of the hospital rang up police station and called the police. Upon the arrival of the police, this witness gave complaint which was duly recorded by the Police Sub Inspector Mr. Rathod. This witness was thereafter admitted as an indoor patient and Ashokbhai was transferred to Ahmedabad as his condition was very serious. During treatment at Ahmedabad Civil Hospital Ashokbhai expired. This witness was shown the weapon used for commission of the crime and he identified the same as having used by appellant no. 1 for causing injuries to him as well as Ashokbhai. In the cross-examination by the defence, this witness has stated that appellant no. 1 was in the legal profession for the last 10 to 12 years. He has further stated that Vinaben had informed them that it was Kailashben, wife of appellant no. 2, who had insulted her when she had gone to extend the invitation. The defence has also tried to bring on record in the cross-examination of this witness that there was a continuous police patrolling in this area and a police point was being maintained on account of communal riots taking place off and on. He has further stated that previously the relations between two families were quite cordial. But subsequently they got strained and for the last 4 to 5 years members of both the families were not on visiting terms. He has denied the suggestion made by the defence that since Vinaben was insulted, he and Ashokbhai had got excited and they had gone to the place of appellant no. 1 armed with weapons. On the contrary, he has stated that they had not done anything which could offend appellant no.1. He has also denied the suggestion that at the time of incident he had

Dhariya and deceased Ashokbhai had stick with him and that they had assaulted appellant no.2 with the same and that when appellant no. 1 tried to intervene, he was also beaten.

9.5. The second witness examined by the prosecution on this aspect is Bhikhabhai Vitthaldas Chauhan P.W.3 Exh.26. This witness is a cobbler and he has his shop in a locality known as Chhantiya Vad and that is where the incident had taken place. According to this witness, at about 9.30 p.m. on 11th September, 1990 his shop was opened but he had gone to answer the call of nature. When he returned to the shop, he saw appellant no.1 coming out of his shop. He tried to stop appellant no. 1, but he could not do so. He has further stated that appellant no. 1 caused injury to deceased Ashokbhai and Bharatbhai with Rapi and thereafter he throw the same inside the shop and went away. According to this witness, he got scared and closed the shop and went home. He has further stated that at the time of incident, appellant nos. 2 and 3 were also present but they did not do anything and it was only appellant no. 1 who caused assault on Ashokbhai and Bharatbhai. In the cross-examination by defence, the witness has stated that he knew that there was some family conflict going on between the two families, namely that of appellant no. 1 and the family of deceased Ashokbhai. He has also stated that he did not notice any injury on the body of appellant no.1. He has also stated that he had no idea whether deceased Ashokbhai and Bharatbhai had weapons with them and that they had assaulted appellant no.1. According to this witness, the Rapi was inside the shop and he had seen appellant no. 1 causing injury to Ashokbhai while he was returning after answering call of nature. He has further stated that he did not notice any police having come to the spot at the time of incident.

9.6. Prosecution has also examined Hasmukhbhai Hirabhai P.W. 4 Exh. 40, who has stated that the incident had taken place about one and half years prior to his giving evidence before the Court. On previous night of the 12th day of the demise of Kanubhai's mother in the front of the house of Jethalal Mangaldas the family members of Kanubhai, wife of appellant no. 1 and the present appellants, Ashokbhai, Bharatbhai Panchal and wife of Jethalal were all discussing regarding the obsequial ceremonies of Mahalaxmiben, mother of Kanubhai. It was about 9.45 p.m. According to this witness, he had asked appellant no. 1 not to intervene in the hot discussion which was going on and he asked him to return home. Appellant no. 1 therefore left the place, but he

went upto the shop of the cobbler and brought some weapon from there. He thereafter assaulted Ashokbhai and Bharatbhai with the said weapon. A rickshaw was thereafter called and Ashokbhai and Bharatbhai were removed to the hospital. On the next day he came to know that Ashokbhai died in Civil Hospital at Ahmedabad. He has further stated that Ashokbhai was hit on the left side of the abdomen and Bharatbhai was given blows on the right hand side shoulder and on the leg. He could see the entire incident in the municipal tubelight, which was there on the road. He has further stated that he did not remember what part was played by appellant nos. 2 and 3 in the incident. According to him, his statement was recorded by the police. In the cross-examination this witness has stated that the discussion which took place amongst the persons aforesaid was a heated one and it had lasted for about 10 to 15 minutes. At the time when the discussion was going on appellant no. 1 was standing in a corner opposite to the place at which these people were standing and he was listening to the altercation. He has further stated that nobody had tried to pacify these persons nor the personnel of SRP had been there when the discussion was going on. He has further stated that it was after he told appellant no. 1 that he should not intervene in the discussion, appellant no. 1 went towards the shop of the cobbler and he saw him extending his hand for grabbing the weapon. However, he could not see whether appellant no. 1 had a weapon with him when he returned from the shop. He could come to know about the weapon in the hand of appellant no. 1 only after he caused injuries to Ashokbhai and Bharatbhai. He has denied the suggestion that Ashokbhai and Bharatbhai had weapons with them at the time of incident. He has further denied the suggestion that on account of his good relations with Kanubhai he was giving false evidence.

9.7 Prosecution has also examined Kanubhai Manibhai Panchal P.W. 5 Exh.42. He has stated that on the following day of 11th September, 1990, it was 12th day of the obsequial ceremonies of his mother. On 11th September, 1990 the wife of Ashokbhai, namely Vinaben had gone to the house of appellant no. 1 for inviting them to a dinner arranged on the 12th day and at that time the sister-in-law of appellant no. 1 had behaved very rudely with Vinaben and had insulted her. Vinaben after returning home informed the family members that sister-in-law of appellant no. 1 had insulted her. At about 9.45 p.m. he and his uncle's sons Bharatbhai and Ashokbhai were sitting on Ota talking about the obsequial ceremonies of his mother. At that time Ashokbhai told the witness that when Vinaben had gone to invite

appellant no. 1 and his family members for dinner, she was insulted by the sister-in-law of appellant no.1. This was overheard by Alkeshbhai, nephew of appellant no. 1 and he went home and informed appellant no. 1 about the talks going on between Kanubhai and deceased Ashokbhai. The witness has further stated that appellant no. 1 came there and he was very enraged. He told Ashokbhai and others why they were talking about them and why they were instigating Kanubhai against them. This witness tried to explain to appellant no. 1 that they were only talking about obsequial ceremonies and nobody was talking about them and so saying the witness took appellant upto the house of one Jethakaka. At that time appellants nos. 2 and 3 came there. Appellant no. 1 all of a sudden got excited and went to the shop of Bhikhabhai cobbler, brought Rapi and caused injury to Ashokbhai on the left side of the abdomen. At that time Bharatbhai tried to intervene, but appellant nos. 2 and 3 caught hold of him; whereas appellant no. 1 caused him injuries on the shoulder and the thigh. After the appellants ran away Ashokbhai was removed to hospital initially at Nadiad and thereafter at Ahmedabad and he died at Ahmedabad in Civil Hospital. In his lengthy cross-examination by the defence nothing much has been elicited which would adversely affect the case of the prosecution.

10. The cumulative effect of the evidence of aforesaid witnesses shows that on 11th September, 1990 some time in the afternoon wife of deceased Ashokbhai, namely Vinaben, had gone to invite the family members of appellant no. 1 to the dinner arranged on the 12th day of the demise of Mahalaxmiben as a part of her obsequial ceremonies. At that time she was insulted by wives of appellant nos. 1 and 2. Vinaben on her returning home, told about it to her family members and at night at about 9.30 p.m. while deceased Ashokbhai, Bharatbhai and Kanubhai were sitting outside the house of Kanubhai they discussed among other things the insult suffered by Vinaben at the hands of wives of appellant nos. 1 and 2. This talk was overheard by Alkeshbhai, who in turn went home and informed appellant no.1, who came there and picked up an altercation with the three brothers. The altercation lasted for about 10 to 15 minutes and thereafter appellant no. 1 went to the shop of Bhikhabhai and brought Rapi with him and caused injury to Ashokbhai on left abdomen and three injuries to Bharatbhai on his right shoulder as well as left thigh. So far as appellant nos. 2 and 3 are concerned, there is no definite evidence that they were alongwith appellant no. 1 or arrived at the scene of offence little later.

It has also come in evidence that except giving one blow to Ashokbhai, appellant no. 1 had not caused any other injury to him. So far Bharatbhai is concerned, appellant no. 1 is alleged to have caused three injuries to him, two on right shoulder and one on left thigh and at the time of assault on him, he was caught hold of by appellant nos. 2 and 3. However, this version is also doubtful in as much as witness Bhikhabhai and witness Hasmukhbhai do not say that any part having been played by appellant nos. 2 and 3 in the incident. Bhikhabhai is very positive that he had not seen appellant nos. 2 and 3 taking any part in the incident. Thus, it becomes very clear that when appellant no. 1 arrived there he was not armed with any weapon and it was only after some heated arguments and exchange of words, he went to the shop of Bhikhabhai and brought Rapi with him and caused single injury to Ashokbhai. If there was any intention on the part of appellant no. 1 to cause death of either Ashokbhai or Bharatbhai or Kanubhai, he would have armed himself before coming to the spot. Moreover, he would have also seen that the other two appellants were duly armed. But that was not so. It was only as a result of this altercation appellant no. 1 lost his temper and in the heat moment he went to the shop of Bhikhabhai and brought Rapi and caused injury to Ashokbhai. Therefore, the offence committed by him would not be covered under any of the clauses of section 300 of the Indian Penal Code, which could be made punishable u/S. 302 of the Indian Penal Code. Looking to the facts and circumstances on record, his act would at the most be covered under Part-I of section 304 of the Indian Penal Code, as could be seen that appellant no. 1 has not taken any undue advantage of the helpless condition of deceased Ashokbhai and has not inflicted more injuries on him.

11. So far criminal liability of appellant nos. 2 and 3 is concerned, the prosecution has tried to assert that there was a common intention shared by all the appellants before arriving at the spot to cause death of any of the aforesaid three persons and in furtherance of their common intention the attack was carried out by appellant no. 1 and, therefore, appellant nos. 2 and 3 were also equally liable for committing the said offence. However, the discussion of evidence of all the four eye witnesses clearly shows that the appellants were not armed and initially when they came to the spot it was only appellant no. 1, who had heated arguments with Ashokbhai, Bharatbhai and Kanubhai. All throughout appellant nos. 2 and 3 had remained silent. Moreover, it is also not very sure whether appellant nos. 2 and 3

arrived at the spot alongwith appellant no. 1 or they came there little later. Further it was appellant no. 1 who all of a sudden went to the shop situated opposite to the place where hot discussion was going on and got Rapi and caused injury to Ashokbhai. There is not an iota of evidence to show that the act was done at the instance of either of the remaining two appellants. In view of this, it is very difficult to accept the contention of the prosecution that appellant nos. 2 and 3 were also equally liable on account of their liability arising u/S. 34 of the Indian Penal Code. In our opinion the prosecution has not been able to prove this aspect and, therefore, the conviction recorded by the trial Court of appellant nos. 2 and 3 u/S. 302 read with section 34 of the Indian Penal Code is bad in law. If the liability of appellant nos. 2 and 3 is not proved by the prosecution by virtue of section 34 of the Indian Penal Code for offence of section 304 Part-I of the Indian Penal Code, appellant no. 1 alone could be held liable and not appellant nos. 2 and 3.

12. So far injuries caused to Bharatbhai by appellant no. 1 is concerned, the say of the prosecution is that the act was facilitated by appellant nos. 2 and 3 by catching hold of Bharatbhai and, therefore, they had actively participated in the attack and thereby abetted appellant no. 1 in committing the offence punishable u/S. 324 of the Indian Penal Code. The evidence of eye witnesses is not consistent on this point in as much as prosecution witnesses Bharatbhai and Kanubhai said that Bharatbhai was caught hold of by appellant nos. 2 and 3 at the time of assault by appellant no.1 and whereas prosecution witnesses Bhikhabhai and Hasmukhbhai do not support this version. Not only that but Bhikhabhai is very assertive on this aspect that he had not seen appellant nos. 2 and 3 taking part in the incident when Bharatbhai was being assaulted. Prosecution witness Hasmukhbhai has also stated that he had no idea whether appellant nos. 2 and 3 had caught hold of Bharatbhai when he was attacked by appellant no. 1 with Rapi. Thus, it can be seen that there are two contradictory versions of the same incident on record and when in a case where the prosecution leads two sets of evidence, each one of which contradicts the other, it is difficult to form the conviction of the appellants. It is also well settled principle of law that when two versions of evidence are on record, one which favours the accused should be accepted. There is yet another aspect to be taken into consideration is this that according to the prosecution appellant no. 1 was very much enraged at the time of incident and if appellant nos. 2 and 3 had

caught hold of Bharatbhai and if they had helped him in carrying out assault on Bharatbhai, the injuries found on the person of Bharatbhai would have been far more serious than they are actually found. According to the medical certificate all the three injuries caused to him were simple injuries and he was discharged from the hospital within two days. In light of this discussion, it is also difficult to accept the proposition of the prosecution that there was common intention which was shared by all the appellants. In light of this discussion, it is difficult to accept that there was any active participation of appellant nos. 2 and 3 in the assault on Bharatbhai and they could not have been convicted with the aid of section 114 of the Indian Penal Code.

13. Mr. Shethna has contended that prosecution has not explained the injuries on appellant no. 1 and 2 and hence it should fail. We do not agree with his submission. It is well established now that non-explanation of injuries could only be fatal to the prosecution if the injuries on the otherside are serious and they are shown to have been caused at the time of incidient in question. Both these aspects are missing in this case.

14. So far the question of imposing sentence is concerned, since appellant no. 1 has already expired, no question of awarding any substantive sentence to him would arise. The learned trial Judge has awarded sentence of imprisonment for life and has also imposed a fine of Rs.5,000/- for offence punishable u/S. 302 of the Indian Penal Code. So far the sentence of imposition of fine of Rs.5,000/- on appellant no. 1 is concerned, the trial Court has given direction to the effect that the amount of fine, if recovered, should be paid to the widow of deceased Ashokbhai Chunilal Panchal by way of compensation. It may be noted here that the widow of Ashokbhai, namely Vinaben and injured witness Bharatbhai Chunilal Panchal, the complainant, have been joined as respondent nos. 2 and 3 in the Criminal Appeal. We have been informed by Mr. Shethna, learned counsel for the appellants that notices were duly served on Vinaben and Bharatbhai. They have chosen not to remain present before this Court. It may also be noted that so far appellant no. 1 is concerned, he has already expired during the pendency of this appeal and the fine that is imposed by the trial Court, which has not been paid till this date, as per the statement made by Mr. Shethna, would be recovered from the properties of appellant no.1. The widow of appellant no. 1 has been permitted to continue this appeal since her proprietory rights are

involved in this appeal. Mr. Shethna has contended that after the death of appellant no. 1, his widow is facing tremendous financial hardship and she is not in a position to pay the amount of fine. In view of these circumstances, we think it desirable to set aside the sentence of imposition of fine of Rs.5,000/- on appellant no. 1 and the same is hereby ordered to be set aside.

15. So far as the appellant nos. 2 and 3 are concerned, their conviction u/S. 302 read with section 34 and u/S. 324 read with section 114 of the Indian Penal Code is hereby set aside. Fine, if paid, be returned to them. The appeal is accordingly partly allowed.

The Muddamal to be disposed of in terms of the directions given by the learned trial Judge in the impugned judgment.

[J.M. PANCHAL, J.]

[AKSHAY H. MEHTA, J.]

* Pansala